

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

NOTICE OF MARKET DOMINANT
PRICE ADJUSTMENT

Docket No. R2018-1

**UNITED STATES POSTAL SERVICE
ANSWER IN OPPOSITION TO U.S. CHAMBER OF COMMERCE MOTION TO
UNSEAL LIBRARY REFERENCE AND MOTION TO REQUEST ISSUANCE OF
INFORMATION REQUEST
(October 23, 2017)**

Pursuant to 39 C.F.R. 3001.21, the United States Postal Service (“Postal Service”) files its Opposition to the U.S. Chamber of Commerce Motion to Unseal Library Reference and Motion to Request Issuance of Information Request (“Motion”).

The Postal Service has made a sufficient and compelling showing that the nature and extent of the commercial injury likely to arise from public availability of the library reference at issue outweigh the public interest in this instance. In addition, the commercially sensitive nature of the type of information at issue in the Motion has been recognized by the Commission in previous dockets and by federal courts. The U.S. Chamber of Commerce (“Movant”) has failed to rebut the Postal Service’s demonstration of commercial injury or otherwise justify the disclosure of the information contained in Library Reference USPS-LR-R2018-1/NP1. Accordingly, the Motion fails to satisfy the applicable rules for requesting disclosure of non-public information, and should be denied by the Commission.

I. Background

On October 6, 2017, the Postal Service filed its Notice of Filing and application for public treatment associated with Library Reference USPS-LR-R2018-1/NP1.¹ On October 16, 2017, Movant filed the Motion.²

The materials in USPS-LR-R2018-1/NP1 designated as non-public contain commercially sensitive information pertaining to country-specific volume and revenue data and non-published rates, and this information is exempt from public disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3).

II. The Postal Service Has Shown Sufficient Justification for Non-Public Treatment of Library Reference USPS-LR-R2018-1/NP1.

In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission must balance “the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.”³ In determining whether to disclose non-public materials in which the Commission determines a third-party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).⁴

¹ Notice of the United States Postal Service of Filing USPS-LR-R2018-1/NP1, Docket No. R2018-1 (Oct. 6, 2017) (“Notice”).

² U.S. Chamber of Commerce Motion to Unseal Library Reference and Motion to Request Issuance of Information Request, Docket No. R2018-1 (Oct. 16, 2017) (“Motion”).

³ 39 U.S.C. § 504(g)(3)(A). *See also* 39 C.F.R. § 3007.33(a).

⁴ 39 C.F.R. § 3007.33(b). Under this rule, the decision whether to allow public disclosure is based on a determination whether the Postal Service has shown “good cause” to protect the third party materials, which in this case would be left to the discretion of the Commission. *See also* 39 U.S.C. § 504(g)(3)(B); *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (holding that disclosure of costs could likely cause competitive harm and that those costs were exempt from disclosure under the Freedom of Information Act); *DNC Parks & Resorts At Yosemite, Inc. v. United States*, 127

The Commission's rules further require that, whenever the Postal Service files non-public materials with the Commission, the Postal Service must also file an application for non-public treatment of the materials, and include in the application a specific and detailed statement setting forth eight factors supporting the application for non-public treatment.⁵

The Postal Service has satisfied the requirements outlined in 39 C.F.R. § 3007.21 and Order No. 225 with respect to its application for non-public treatment of Library Reference USPS-LR-R2018-1/NP1.⁶ As explained in the application, the library reference at issue contains commercially sensitive information, including the Postal Service's proprietary information pertaining to country-specific volume and revenue data and non-published rates.

With respect to the commercially sensitive information, the Postal Service has met the requirements of 39 U.S.C. § 504(g)(3)(A) and 39 C.F.R. § 3007.33(a). The Postal Service has shown that the nature and extent of the likely commercial injury caused by its competitors obtaining country-specific revenue and volume data outweighs the public interest in financial transparency with respect to this data.

Fed.Cl. 435 (2016) (granting protective order in recognition of the commercially sensitive nature of information, including a breakdown of revenues by operational category, and the likelihood that public disclosure would enable competitors to gain a competitive advantage).

⁵ 39 C.F.R. § 3007.21.

⁶ PRC Order No. 225, Final Rules Establishing Appropriate Confidentiality Procedures, Docket No. RM2008-1, June 19, 2009.

Library Reference USPS-LR-R2018-1/NP1 contains country-specific volume and revenue data regarding inbound letter post and outbound First-Class Mail International (“FCMI”), which face significant competition from private sector competitors and Extraterritorial Offices of Exchange (“ETOE”).⁷ The competitive nature of the international market, particularly with respect to outbound FCMI and inbound letter post packets weighing 4.4 pounds or less, is well-established.⁸ Due to this competitive environment, the public disclosure of Library Reference USPS-LR-R2018-1/NP1 would provide ETOEs and private sector competitors with a competitive advantage and interfere with the ability of the Postal Service and foreign posts to negotiate bilateral and multilateral agreements that enable effective competition in the international market. Accordingly, harm to the Postal Service and foreign posts whose information is included in Library Reference USPS-LR-R2018-1/NP1 is likely to result from such disclosure.

As the Postal Service explained in its application for non-public treatment, Library Reference USPS-LR-R2018-1/NP1 contains commercially sensitive data and should be treated as non-public pursuant to 39 C.F.R. § 3007.21 and Order No. 225.

III. Non-Public Treatment of Library Reference USPS-LR-R2018-1/NP1 Is Consistent With Precedent of the Commission and Courts.

The Postal Service has followed a long-standing practice of filing this type of information under seal with the Commission.⁹

⁷ U.S. Department of State, Extraterritorial Offices of Exchange (ETOE) located in the United States, available at <https://www.state.gov/p/io/ipp/195867.htm> (last visited on Oct. 20, 2017).

⁸ See 39 C.F.R. § 320.8 (suspending Private Express Statutes for international mail in certain circumstances).

⁹ See, e.g., Order Granting Motion for Access to Non-Public Materials Filed Under Seal, Order No. 3560, Docket No. RM2016-10 (Oct. 11, 2016) (recognizing commercially sensitive nature of certain international data of foreign postal operators); Order Granting, In Part, Request for Data and Explanations, Order No. 3427, Docket No. IM2016-1 (July 14, 2016) at 6-7 (recognizing commercially sensitive nature of certain

The Commission has recognized the commercially sensitive nature of international data similar to the data at issue here. For example, in Docket No. IM2016-1, FedEx requested public disclosure of inputs used to forecast the financial impact of changes in terminal dues, including volume and weight data by surface and air, and by target and transition system, and disaggregated volume and weight data by country and transportation method.¹⁰ The Commission recognized the commercially sensitive nature of these data, and denied FedEx's request for public disclosure.¹¹

Similarly, in Docket No. RM2016-10, the Commission considered a motion for access to certain disaggregated data of foreign postal operators organized by operator and by product. "Recogniz[ing] that the Postal Service has a legitimate interest in protecting confidential commercial data," the Commission granted the motion for access on the condition that "the parties first file an executed agreement regarding inadvertent disclosure."¹²

And in other contexts, courts have recognized the commercially sensitive nature of data similar to those at issue in this docket, including disaggregated revenue data.¹³ For example, in *DNC Parks & Resorts At Yosemite, Inc. v. United States*, the Court of Federal Claims considered a request for a protective order for an intellectual property evaluation report that contained information regarding operating margin and revenues by location and operational category.¹⁴ In its decision granting the protective order, the Court acknowledged the commercially sensitive nature of the information – particularly

data regarding Inbound and Outbound Letter Post); Order Granting Revised Second Motion for Access, Order No. 3044, Docket No. ACR2015 (Jan. 22, 2016) (recognizing commercially sensitive nature of certain foreign postal operator information).

¹⁰ Order No. 3427 at 6-7.

¹¹ *Id.*

¹² Order No. 3560 at 4-5.

¹³ *Supra* note 4.

¹⁴ *DNC Parks & Resorts*, 127 Fed. Cl. at 440.

the breakdown of revenues by operational category – and the likelihood that the information, if disclosed, could be used by competitors to gain a competitive advantage.¹⁵

IV. The Motion is Procedurally and Substantively Deficient and Should be Denied.

For the reasons discussed below, the Motion does not satisfy the applicable rules for requesting disclosure of non-public information. Pursuant to 39 U.S.C. § 3001.31, a request that the Commission publicly disclose non-public materials must include “a specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to § 3007.21 or § 3007.22.” The Movant fails to address the Postal Service’s justification for nonpublic treatment or provide any reason to disregard the third-party interests at stake. The Motion is insufficient to rebut the presumption of non-public treatment of the library reference.

The Motion focuses on broad, policy concerns – including the relative economic positions of U.S. and foreign merchants and manufacturers, the application of terminal dues rates in the Universal Postal Union Conventions, and differences in Commission transparency requirements for domestic and international market-dominant mail – rather than the rates and other issues specific to this docket.¹⁶ The Motion does not provide any “specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the

¹⁵ *Id.*

¹⁶ Motion at 1-4.

application for relief submitted pursuant to § 3007.21 or § 3007.22.”¹⁷ More specifically, the Motion fails to acknowledge the Postal Service’s assertions that release of the information could provide an advantage to its competitors, and fails to address the Postal Service’s explanation that public disclosure would (1) enable competitors to assess comparative vulnerabilities and focus sales and marketing efforts on those areas of vulnerability, (2) provide foreign postal operators with a competitive advantage in contract negotiations with the Postal Service, and (3) allow competitors of a foreign postal operator to assess the market size and costs of that foreign postal operator and develop a competitive alternative.¹⁸

Further, the Motion fails to address the interests of the Postal Service in protecting proprietary information obtained from third parties based upon assurances of confidentiality. Thus, the Motion does not meet the requirements of 39 C.F.R. § 3007.33(b).

Finally, public disclosure of Library Reference USPS-LR-R2018-1/NP1 is not necessary to address the broad policy issues regarding terminal dues and transparency requirements that are the primary focus of the Motion. The scope of these issues extends far beyond this docket, and these issues cannot be resolved within this docket through the disclosure of nonpublic information. These issues are more appropriate for discussion at a meeting of the Advisory Committee on International Postal and Delivery Services. To the extent that Movant seeks to address rates and other issues specific to this docket, the Commission has established procedures to provide interested parties with access to nonpublic information that will enable the effective participation in this

¹⁷ 39 U.S.C. § 3001.31.

¹⁸ Notice, Appendix A, at 5-7.

docket, subject to review by the Postal Service and third parties with an interest in the nonpublic information.

V. Conclusion

For the reasons identified above, the Postal Service respectfully requests that the Commission deny the Motion.

Respectfully submitted,

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